

# **Tentative Rulings for October 19, 2020**

## **Department 7**

**To request oral argument, you must notify Judicial Secretary  
Vanessa Siojo at (760) 904-5722  
and inform all other counsel no later than 4:30 p.m.**

This court follows California Rules of Court, Rule 3.1308 (a) (1) for tentative rulings (see Riverside Superior Court Local Rule 3316). Tentative Rulings for each law & motion matter are posted on the Internet by 3:00 p.m. on the court day immediately before the hearing at <https://www.riverside.courts.ca.gov/OnlineServices/TentativeRulings/tentative-rulings.php>. If you do not have Internet access, you may obtain the tentative ruling by telephone at (760) 904-5722.

To request oral argument, no later than 4:30 p.m. on the court day before the hearing you must (1) notify the judicial secretary for Department 7 at (760) 904-5722 and (2) inform all other parties of the request and of their need to appear telephonically, as stated below. If no request for oral argument is made by 4:30 p.m., the tentative ruling **will become the final ruling** on the matter effective the date of the hearing. **UNLESS OTHERWISE NOTED, THE PREVAILING PARTY IS TO GIVE NOTICE OF THE RULING.**

**IN LIGHT OF THE CORONAVIRUS PANDEMIC; AND UNTIL FURTHER NOTICE, COUNSEL AND SELF-REPRESENTED PARTIES MUST APPEAR AT ANY LAW AND MOTION DEPARTMENT TELEPHONICALLY WHEN REQUESTING ORAL ARGUMENTS. IN-PERSON APPEARANCES WILL NOT BE PERMITTED.**

**TELEPHONIC APPEARANCES:** On the day of the hearing, call into one of the below listed phone numbers, and input the meeting number (followed by #):

- Call-in Numbers: 1 (213) 306-3065 or 1 (844) 621-3956 (TOLL FREE)
- Meeting Number: **808-890-717#**
- Press **#** again

Please **MUTE** your phone until your case is called and it is your turn to speak. It is important to note that you must call fifteen (15) minutes prior to the scheduled hearing time to check in or there may be a delay in your case being heard.

For additional information and instructions on telephonic appearances, visit the court's website at <https://riverside.courts.ca.gov/PublicNotices/Webex-Appearances-Public-Access.pdf?rev=05-29-2020-09:54:48am>.

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| RIC1821801 | KUCICH VS VOLKSWAGEN<br>GROUP OF AMERICA INC | DEMURRER TO 1ST AMENDED<br>COMPLAINT OF LINDSEY KUCICH BY<br>VOLKSWAGEN GROUP OF AMERICA<br>INC, RIVERSIDE METRO AUTO GROUP<br>LLC |
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**Tentative Ruling:** Defendants Volkswagen Group's, et al. (collectively "Defendant") demurrer is overruled. Defendants shall file and serve an answer to the First Amended Complaint ("FAC") of plaintiff Kucich ("Plaintiff") within 20 days.

Statute of Limitations/Delayed Discovery/Tolling

Defendant contends the statute of limitations bars the breach of implied warranties, fraud and negligent repair causes of action.

1. Breach of Implied Warranties (1<sup>st</sup> and 2<sup>nd</sup> causes of action)

Under Civil Code §1791.1, the implied warranty lasts for no less than 60 days and no more than 1 year of the sale.

For a Song-Beverly Act violation, the statute does not include its own statute of limitations. (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1305.) Accordingly, Commercial Code § 2725 governs the applicable statute of limitations. (*Id.* at 1305-1306; *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 132.) Section 2725 states in pertinent part:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

A cause of action for breach of warranty accrues from the date the goods are delivered (regardless of the date of discovery of breach), unless the warranty explicitly extends to future performance of the goods. (*Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 129; *Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205, 216.) This claim is based on breach of implied warranties. "Because an implied warranty is one that arises by operation of law rather than by an express agreement of the parties, courts have consistently held it is not a warranty that 'explicitly extends to future performance of the goods.'" (*Cardinal Health*, supra, 169 Cal.App.4th at 134.)

In *Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1304, the court acknowledged section 1791.1, but held "[t]he implied warranty of merchantability may be breached by a latent defect undiscoverable at the time of sale." *Mexia* sued for breach of implied warranty under the Song-Beverly due to a latent defect, i.e. his boat engine corroded. (*Id.* at 1301-1302.) *Mexia* had purchased the boat in 2003, had repairs in 2005 due to defects, and in 2006, discovered that the defendants could not make the boat conform to the warranties. (*Id.*) On appeal, the defendants argued that the duration period required the consumer to discover and report the latent condition within the one-year period. (*Id.* at 1308-1309.) The court found that section 1791.1(c) did not require that a consumer discover and report the latent defect within the time period. (*Id.* at 1310.) The court reasoned that the defendant's interpretation would require a notification deadline even if the consumer had not discovered the breach during the duration

period. (*Id.*) The court, however, did appear to recognize that if the latent defect did not exist at the time of sale, there was no breach. (*Id.* at 1308.) The court recognized that the four-year statute of limitations did not apply because the complaint was filed within four years of the sale. (*Id.* at 1307.)

As Plaintiff has pled this as a latent defect (FAC ¶ 17, 27), *Mexia* applies for the duration of the warranty issues.

Commercial Code § 2725(4) permits tolling. “Equitable tolling is a judge-made doctrine...to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.” (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.) Equitable tolling, in effect, stops the running of the limitations period during the tolling event, and only begins to run when the tolling event has finished. (*Id.*) “The effect of equitable tolling is that the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred.” (*Id.* at 370–371.)

a. Fraudulent Concealment/Tolling/Estoppel

Plaintiff labels this as both tolling and estoppel. (FAC ¶ 76-100.) However, the issue here is tolling by fraudulent concealment. “The doctrine of fraudulent concealment, which is judicially created [citations], limits the typical statute of limitations. ‘[T]he defendant’s fraud in concealing a cause of action against him tolls the applicable statute of limitations....’ [Citations.] In articulating the doctrine, the courts have had as their purpose to disarm a defendant who, by his own deception, has caused a claim to become stale and a plaintiff dilatory.” (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 533.) A plaintiff must plead “fraudulent conduct by the defendant resulting in concealment of the operative facts, failure of the plaintiff to discover the operative facts that are the basis of its cause of action within the limitations period, and due diligence by the plaintiff until discovery of those facts.” (*Sagehorn v. Engle* (2006) 141 Cal.App.4th 452, 460–461.)

Here, this tolling doctrine is sufficiently pled. Plaintiff alleges Defendant knew about the defect since 2009, as it issued various articles and technical bulletins to its dealers regarding the defect; knew from testing data, consumer complaints, warranty data, etc. (FAC ¶¶30-59.) In addition, as discussed in *Mexia*, the implied warranty of merchantability may be breached by a latent defect undiscoverable at the time of sale. (*Mexia, supra*, 174 Cal. App. 4th 1297, 1304, 1308–10). Where a latent defect exists, the statute of limitations is tolled “until the plaintiff discovers, or has reason to discover, the cause of action[.]” (*Fox v. Ethicon Endo-Surgery, Inc.*, (2005) 35 Cal.4th 797, 807). As such, tolling applies here and the FAC is not barred by the statute of limitations as to these causes of action.

2. Negligent Repair and Fraud causes of action (3<sup>rd</sup>-6<sup>th</sup> causes of action)

The statute of limitations for the negligent repair and fraud causes of action is three years. (CCP §338(b-d).) Fraud does not accrue until the discovery of the facts constituted the fraud. (*Id.*) Here, Plaintiff has pled that she could not have discovered her claims until 6/14/18 because Defendant concealed the timing chain defect and she could not have any notice that the problems she was experiencing with her vehicle were related to the defect until the class action was certified. (FAC ¶ 86-100.)

“ ‘Although the statute does not expressly provide that the claim will accrue based upon either actual or inquiry notice of the claimant, California courts have long construed it in such a fashion.’ [Citation.] As our Supreme Court has long held, under Code of Civil Procedure section 338, subdivision (d), a ‘plaintiff must affirmatively excuse his [or her] failure to discover the fraud within three years after it took place, by establishing facts showing that he [or she] was not negligent in failing to make the discovery sooner and that he [or she] had no actual or presumptive

knowledge of facts sufficient to put him [or her] on inquiry.’ ” (*Krolkowski v. San Diego City Employees’ Retirement System* (2018) 24 Cal.App.5th 537, 561-562.) Here, Plaintiff sufficiently pled concealment/fraud by omission. Whether or not concealment actually occurred or Plaintiff should have known earlier cannot be determined on demurrer. The statute of limitations does not bar these causes of action based on the face of the FAC.

#### 6th-8th Causes of Action – Fraud by Omission/Concealment and Misrepresentation

Fraud actions are subject to strict requirements of particularity in pleading. (See *Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.)

Fraud by omission/concealment requires: “(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.” (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613.) A claim for fraudulent concealment can be based on facts known only to a defendant, defendant knows plaintiff does not know these facts and cannot reasonably discover them, and where the defendant actively conceals discovery from plaintiff. (*Warner Constro. Corp. v. L.A.* (1970) 2 Cal.3d 285, 294.) In this case, where the Defendant has exclusive knowledge, the duty to disclose may arise from a transactional relationship between the parties, including seller/buyer, employer/prospective employee, doctor/patient, or parties entering into a contract. (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336.) Plaintiff sufficiently pleads that the knowledge was only known to Defendant. (FAC ¶ 30-59.)

The issue raised by Defendant is specificity as Plaintiff fails to state any actionable misrepresentation or reliance. In the FAC, however, Plaintiff alleges that Defendant misrepresented that the timing chain system would last at least 120,000 miles and reliance on the misrepresentations. (FAC ¶¶ 25, 41, 66, 75, 144, 150 and 156.) Plaintiff’s allegations are sufficient at the pleading stage to demonstrate a misrepresentation to support the fifth and sixth causes of action.

While specificity is required as to affirmative misrepresentations, to apply it to concealment claims would be hard as it would require plaintiff to describe something that did not happen. (*Alfaro v. Community Housing Improvement System & Planning Association, Inc.* (2009) 171 Cal.App.4th 1356, 1384.) Here, Plaintiff pled knowledge (including how Defendant knew) of the material facts (FAC ¶30-59), that it intended to conceal the facts (FAC ¶ 52, 55, 67, 74, 133, 135- 137), that had Plaintiff known of the defect she would not have purchased (FAC ¶ 140), and damages (FAC ¶141).

Defendant relies heavily on *Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 833-837 claiming the fraud causes of action are otherwise inactionable. In *Daugherty*, the question was whether an omission was actionable under the CLRA (which is not at issue in this case). The defect at issue was an engine that over time, would result in slippage or dislodgment of the front balancer shaft oil seal, which would cause oil loss, contamination of nearby engine parts and in severe cases, replacement of the engine. (*Id.* at 827.) The court acknowledged that an omission could be the basis of CLRA, but there had to be a duty to disclose. (*Id.* at 835.) The court found that the plaintiff had only pled an unreasonable risk and potential damages (i.e. the cost of repairs), but not physical injury or safety concerns regarding the defect. (*Id.* at 836-837.)

As stated in *Rutledge v. Hewlett-Packard Co.* (2015) 238 Cal.App.4th 1164, 1174, “neither *Daugherty* nor *Bardin* preclude a duty to disclose material information known to a manufacturer and concealed from a consumer.” A material defect can be sufficient. (*Id.* at 1175-1176 (again

applying the CLRA.) Contrary to *Daughtery* (assuming it applied to common law fraud claims), Plaintiff specifically pled that this defect causes the engine to lose power which causes a loss of ability to accelerate, control steering or fully break presenting significant safety risks. The allegations of a complaint must be regarded as being true for purposes of ruling upon demurrers. (*Dryden v. Tri-Valley Growers* (1977) 65 Cal. App. 3d 990, 998.) Plaintiff has properly pled the fraud causes of action.

### Economic Loss Rule

The economic loss rule bars “a plaintiff’s tort recovery of economic damages unless such damages are accompanied by some form of physical harm (i.e. personal injury or property damage.” (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 777.) The economic loss rule requires a purchaser whose product is not working properly be limited to a contract remedy; to avoid the economic loss rule, the purchaser must “demonstrate harm above and beyond a broken contractual promise.” (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988.) This is to avoid contract and tort law from “dissolving one into the other.” (*Id.*)

Generally, the economic loss rule does not apply to claims of fraudulent inducement. (*Erllich v. Menezes* (1999) 21 Cal.4th 543, 552; *Las Palmas Assoc. v. Las Palmas Center Assoc.* (1991) 235 Cal.App.3d 1220, 1238 (*Las Palmas*).) As the *Las Palmas* court put it, “no public policy is served by permitting a party who never intended to fulfill his obligations to fraudulently induce another to enter into an agreement.” (235 Cal.App.3d at p. 1238.) All of Plaintiff’s theories are based on fraudulent inducement for Plaintiff to purchase Defendant’s vehicle.

In *Robinson*, the plaintiff was a helicopter manufacturer which used sprag clutches manufactured by the defendant. (*Robinson*, supra, 34 Cal.4th at 985.) Under federal law, aircraft manufacturers must obtain a “type certificate” such that every aircraft must be produced in accordance to the certificate. (*Id.*) The defendant changed its sprag clutches without notifying the FAA or the plaintiff. (*Id.* at 985-986.) The plaintiff later had problems with the sprag clutches cracking, and as a result, was required to recall and replace all of the sprag clutches. (*Id.* at 986.) The plaintiff’s fraud claim was based on the false certificates of conformance that were mandatorily required. (*Id.* at 990.) The court found that the economic loss rule did not bar the fraud claims because they were independent of the breach of contract claim. (*Id.* at 991.)

Plaintiff sufficiently alleged an independent duty of Defendant concealing the defects. That is sufficient for pleading purposes.

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| RIC1821801 | KUCICH VS VOLKSWAGEN GROUP OF AMERICA INC | MOTION TO/FOR STRIKE IMPROPER DAMAGE ALLEGATIONS FROM PLAINTIFFS FIRST AMENDED COMPLAINT BY VOLKSWAGEN GROUP OF AMERICA INC, RIVERSIDE METRO AUTO GROUP LLC |
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**Tentative Ruling:** Defendants Volkswagen Group’s, et al. (collectively “Defendant”) motion to strike allegations from the First Amended Complaint (“FAC”) of plaintiff Kucich (“Plaintiff”) is denied.

The court may, upon a motion made pursuant to CCP § 435, or at any time in its discretion, and upon terms it deems proper strike out any irrelevant, false, or improper matter inserted in any pleading, or strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule or an order of the court. (CCP § 436.) A motion to strike is also the proper vehicle to attack a punitive damages claim where facts alleged may not rise to the level of fraud, malice or oppression. (CCP §§ 435-436; *Truman v. Turning Point of Central Calif., Inc.*

(2010) 191 Cal.App.4th 53, 63.) As with a demurrer, on a motion to strike “the court treats as true the material facts alleged in the complaint, as well as any facts which may be implied or inferred from those expressly alleged.” (*Washington Internat. Ins. Co. v. Superior Court* (1998) 62 Cal. App. 4th 981, 984 (footnote 2).)

As discussed in the Tentative Ruling on the demurrer, Plaintiff has sufficiently pled fraud to support punitive damages. Ratification is generally alleged at FAC ¶ 7 and the efforts of Defendant to market and conceal the defect.

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| RIC1902583 | KAMEL VS PROGRESSIVE<br>PROTECTIVE SERVICES INC | MOTION TO/FOR COMPEL<br>PROGRESSIVE PROTECTIVE SERVICES<br>INC RESPONSES TO REQUEST FOR<br>PRODUCTION OF DOCS BY GEORGE<br>KAMEL |
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**Tentative Ruling:** The unopposed Motion to Compel is GRANTED, IN PART. The Court notes the 10/2/20 e-mail from defense counsel to plaintiff’s counsel indicating that the Motion to Compel will not be opposed and that defendants will be providing responses to the subject discovery.

The Court imposes sanctions in the amount of \$765.00 on non-responding defendant. The sanctions shall be paid to plaintiff, through plaintiff’s counsel, within 30 days.

The Court will complete, file, and image for the Court’s website the proposed Order submitted by plaintiff. As the prevailing party, plaintiff shall serve a conformed copy of the Order on all parties and file proof of such service with the Court.

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| RIC1902583 | KAMEL VS PROGRESSIVE<br>PROTECTIVE SERVICES INC | MOTION TO/FOR ORDER THAT<br>MATTERS IN REQUEST FOR<br>ADMISSIONS, SET ONE, TO<br>PROGRESSIVE PROTECTIVE SERVICES<br>INC BY GEORGE KAMEL |
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**Tentative Ruling:** The unopposed Motion to Compel is GRANTED, IN PART. The Court notes the 10/2/20 e-mail from defense counsel to plaintiff’s counsel indicating that the Motion to Compel will not be opposed and that defendants will be providing responses to the subject discovery.

The Court imposes sanctions in the amount of \$765.00 on non-responding defendant. The sanctions shall be paid to plaintiff, through plaintiff’s counsel, within 30 days.

The Court will complete, file, and image for the Court’s website the proposed Order submitted by plaintiff. As the prevailing party, plaintiff shall serve a conformed copy of the Order on all parties and file proof of such service with the Court.

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| RIC1902583 | KAMEL VS PROGRESSIVE<br>PROTECTIVE SERVICES INC | MOTION TO/FOR ORDER TO COMPEL<br>DEFT SHERIF ESHAKS RESPONSES TO<br>REQUEST FOR PRODUCTION OF<br>DOCUMENTS BY GEORGE KAMEL |
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**Tentative Ruling:** The unopposed Motion to Compel is GRANTED, IN PART. The Court notes the 10/2/20 e-mail from defense counsel to plaintiff’s counsel indicating that the Motion to Compel will not be opposed and that defendants will be providing responses to the subject discovery.

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The Court will complete, file, and image for the Court's website the proposed Order submitted by plaintiff. As the prevailing party, plaintiff shall serve a conformed copy of the Order on all parties and file proof of such service with the Court.

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| RIC1904437 | PINA VS COMPLETE COACH WORKS | MOTION TO/FOR COMPEL RESPONSE TO FORM INTERROGATORIES, SET ONE, REQUEST FOR MONETARY SANCTIONS BY COMPLETE COACH WORKS |
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**Tentative Ruling:** Responses to Form Interrogatories, Set One were served on 9/25/20. Hence, the Motion to Compel is moot on the response issue.

The Court denies the request that it impose sanctions. Sanctions are mandatory unless the losing party opposed the motion with substantial justification or sanctions are unjust. (C.C.P. § 2030.300(d).) Based on the declaration of plaintiff Pina's counsel, regarding the COVID related loss of office staff, staff working remotely, etc., the imposition of sanctions would be unjust.